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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1954

No. 28

EVELYN RICE, PETITIONER,

vs.

SIOUX CITY MEMORIAL PARK CEMETERY, INCORPORATED, A CORPORATION; F. K. LYTLE AND J. M. GUNNELL

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF IOWA

PETITION FOR CERTIORARI FILED FEBRUARY 15, 1954

CERTIORARI GRANTED APRIL 12, 1954

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1954

No. 28

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SIOUX CITY MEMORIAL PARK CEMETERY, INCORPORATED, A CORPORATION; F. K. LYTLE AND J. M. GUNNELL

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IN DISTRICT COURT OF WOODBURY COUNTY

4-48304

EVELYN RICE, Plaintiff and Appellant,

vs.

SIOUX CITY MEMORIAL PARK CEMETERY, INCORPORATED, a Corporation; F. K. Lytle and J. M. Gunnell, Defendants and Appellees

[fol. 3] STIPULATION OF SETTLED RECORD

Come now all the parties by their respective attorneys of record and agree that the following is the settled and agreed upon record upon which this matter is to be presented to the Supreme Court. The record includes all of the pleadings and all of the rulings by the Court on the various motions filed by the parties, except only the petition for removal of the action to the Federal Court and the Federal Court's ruling on said petition and order of remand to the State Court, a copy of the Federal Court's written opinion thereon being readily available by reference to 102 Federal Supplement 658, this settled record being filed in pursuance of Rule 340, Par. (h) of the Rules of Civil Procedure.

(S.) Neil R. McCluhan and Kindig & Beebe, by Lowell C. Kindig, Attorneys for Plaintiff-Appellant. (S.) Shull & Marshall, by Jesse Marshall and Harper, Gleysteen & Nelson, by H. C. Hayser, Attorneys for Defendants-Appellees.

IN DISTRICT COURT OF WOODBURY COUNTY

COURT CERTIFICATE—Filed January 19, 1953

This is to certify that the following constitutes the complete settled record filed in the office of the Clerk of the District Court of Iowa, in and for Woodbury County, on the [fol. 4] 19th day of January, 1953, it being the record agreed upon by the attorneys of record and constitutes the record

on appeal in pursuance to Rule 349 (h) of the Rules of Civil Procedure.

(S.) Ralph C. Prichard, Judge of the District Court.

Recorded —— —, ——.

[fols. 5-6] In District Court of Woodbury County

Amended Petition Combining the Original Petition as Twice Amended—Filed December 5, 1952

Comes now the plaintiff, Evelyn Rice, and in this, her cause of action against the defendants, states to the Court that:

Count I

Par. 1. She is a resident of Winnebago, Nebraska, and the defendant, Sioux City Memorial Park Cemetery, Incorporated, is a corporation incorporated under the laws [fol. 7] of the State of Iowa, with its principal place of business in Woodbury County, Iowa, and that the defendants, F. K. Lytle and J. M. Gunnell, are officers and managing directors of said corporation and are residents of Sioux City, Woodbury County, Iowa.

Par. 2. On or about the 17th day of August, A. D. 1951, the plaintiff entered into a written contract, hereto attached and marked Exhibit "A", and by this reference made a part hereof, for the purchase of three cemetery lots belonging to the Sioux City Memorial Park Cemetery, Incorporated, a corporation, one of which lots was to be used for the burial of her husband, Sergeant John Rice, and the defendant corporation, through its authorized representatives, was so advised, and in part performance of this contract the plaintiff paid the sum of $100.00 to the defendant corporation.

Par. 3. Said Sergeant John Rice was a Sergeant in the United States Army and had been killed in combat while on active duty with the United States Army in Korea, and his body, at the time the contract was entered into, was being returned to the United States for burial.

Par. 3-a. At the time the contract was entered into, the

defendants knew, or reasonably should have known, that Sergeant Rice was a Winnebago Indian.

Par. 4. On or about the 28th day of August, A. D. 1951, pursuant to arrangements made between the plaintiff and the defendant cemetery, a burial ceremony was held at the cemetery maintained by the corporation on the outskirts of Sioux City, Iowa, for final interment of the body.

[fol. 8] Par. 5. The services were attended by the plaintiff, members of her family, members of her deceased husband's family, representatives of the United States Army, a representation of the American Legion Post of Winnebago, Nebraska, and friends of the plaintiff and the decedent. The burial was likewise supervised by representatives of the Sioux City Memorial Park Cemetery, Incorporated, who were present throughout all of the ceremony.

Par. 6. Preceding the ceremony, the funeral procession was met at the entrance of the cemetery and the said procession was escorted to the grave-site by representatives of the defendant corporation and others, and the proceedings were thereupon carried out without objection or interference by the defendant corporation.

Par. 7. Upon the completion of the burial ceremony and after the sounding of Taps, the plaintiff and other interested persons left the cemetery with the knowledge and belief that the body was to be lowered into the grave and the grave covered.

Par. 8. The plaintiff left the premises of the defendant corporation at about 11:30 A. M. on August 28, 1951 and returned to her home near Winnebago, Nebraska. The defendant corporation then notified the undertaking parlor having charge of the arrangements that it would not permit the body to be placed in the ground and that other or different arrangements would have to be made for the interment of said body. Thereafter, and at approximately 4:00 o'clock P. M. of the same day, the plaintiff was advised and informed [fol. 9] that after the completion of the funeral ceremony the defendant corporation had refused to lower the body of her deceased husband into the ground and had wrongfully and without plaintiff's permission caused said body to be removed from the gravesite and transported to various locations in and near the cemetery premises.

Par. 9. At the time and place of receiving this information, the plaintiff was in a highly nervous and distraught condition because of the emotional factors involved in the burial of her deceased husband and the care and maintenance of their three minor children, ages six, three, and two. At this point she was advised that the refusal to bury her soldier husband was because of the fact that he had Indian blood in his veins and that he was not a Caucasian, and that the body would have to be claimed by her for further disposition.

Par. 10. Upon being advised of this refusal on the part of the defendant corporation to lower the body into the grave, the plaintiff returned to Winnebago and there visited with representatives of the defendant corporation, and at said time and place the defendant corporation tendered the plaintiff an affidavit, a copy of which is hereto attached and marked Exhibit "B", and by this reference made a part hereof, which it had prepared and requested that she sign said affidavit, but the plaintiff refused to sign said affidavit because it stated, among other things, that her deceased husband was a member of the Caucasian race, and she had been advised by the representatives of the defendant corporation that their refusal to permit the burial of her deceased husband was based upon the fact that he, being an Indian, [fol. 10] was not a member of the Caucasian race.

Par. 11. Following the refusal of the defendant corporation to permit Sergeant John Rice's body to be buried in the defendant corporation cemetery, and while the plaintiff attempted to make other arrangements for the interment of her husband's body, the President of the United States intervened and arranged for the burial of the plaintiff's husband's body in the Arlington National Cemetery, at Arlington, Virginia, and arrangements and interment were finally made in said Cemetery.

Par. 12. The acts of the defendant caused her great mental distress, humiliation, emotional fatigue, and nervous exhaustion, which condition was subsequently aggravated by the acts of the defendant in issuing statements and publications causing the plaintiff to be held up to ridicule and humiliation because of her marriage to the defendant, and the fact that part of his ancestors were of Indian blood and descent.

Par. 13. One of said publications which was given general circulation is hereto attached and marked Exhibit "C", and by this reference made a part hereof, makes numerous false and misleading statements all to the damage of the plaintiff.

Par. 14. The general tenor of said publication, Exhibit "C", was to hold the plaintiff and her deceased husband to public ridicule and contempt and to continue and extend the humiliation and mental suffering caused the plaintiff by the acts of the defendants.

[fol. 11] Par. 15. The acts of the defendants in refusing to permit the burial of the body of the plaintiff's deceased husband was in direct violation of the plaintiff's rights under the laws of the State of Iowa and of the United States, and under the Fifth and Fourteenth Amendments to the Constitution of the United States and under Section 1, Article 1 and Section 6, Article 1 of the Constitution of the State of Iowa, and, further, was in direct contravention against public policy, and, should a State Court condone the defendants' conduct, it would violate the Fourteenth Amendment to the Constitution of the United States; and, should a Federal Court condone defendants' conduct, it would be in direct violation of the Fifth Amendment to the Constitution of the United States.

Par. 15-a. The clause in the contract restricting burial privileges only to members of the Caucasian race and the conduct of the defendants herein violate the public policy of the United States and of the United Nations, as is reflected in its Charter and as is specifically reflected in the Preamble to said Charter and Chapter 1, Article 1 (3), Chapter 4, Article 13-b, and Chapter 9, Articles 55 and 56; and further said clause in the contract and the conduct of the defendants was a direct violation of Articles 55 and 56 of Chapter 9 of the United Nations Charter and of the plaintiff's rights thereunder, and under Article 6 of the Constitution of the United States this Court is bound by said United Nations Charter.

Par. 16. The acts of the defendants, and each of them, hereinabove set out and complained of, were willful and [fol. 12] malicious and were the direct and proximate cause of the damage herein complained of and suffered by the plaintiff.

Par. 17. The plaintiff was herself free from any negligence contributing in any manner or degree to the damage herein complained of.

Par. 18. As a result of the willful and malicious conduct of the defendants hereinabove set out, the plaintiff has been damaged because of humiliation, nervous upset, and being held up to public ridicule under the circumstances in the sum of $20,000.00.

Par. 19. In addition thereto, the acts of the defendants being willful and malicious and being done with the knowledge that said illegal conduct on their part would harm the plaintiff and subject her to humility and nervous upset, plaintiff is entitled to recover punitive or exemplary damages in the sum of $40,000.00.

Par. 20. This cause of action is the property of this plaintiff and demand has been made upon the defendants and they have failed and refused to pay said damages, or any part thereof.

Wherefore, plaintiff prays that she be given judgment in the sum of $60,000.00, together with interest thereon at the rate of 5 per cent per annum from the date of judgment, and for the costs of this action.

Count II

Comes now the plaintiff and, for this, her separate and different cause of action against the defendants, and each of them, respectfully states to the Court:

[fol. 13] All of the allegations in Paragraphs 1, 2, 3, 3-a, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, and 14 of Count I of this petition are by this reference made a part hereof without repetition.

Par. 15. That part of the written contract heretofore referred to as Exhibit "A" attached to this petition which reads:

> "This agreement is assignable only with the consent of seller, and burial privileges accrue only to members of the Caucasian race * * *"

is an illegal and unenforcible provision and is void because it is against public policy and violates the Fifth and Fourteenth Amendments to the Constitution of the United States

and Section 1, Article 1 and Section 6, Article 1 of the Constitution of the State of Iowa, and further violates the laws of the United States Government, and, should a State Court enforce or condone said provision, it would violate the Fourteenth Amendment to the Constitution of the United States, and, should a Federal Court enforce or condone said provision, it would violate the Fifth Amendment to the Constitution of the United States.

Par. 15-a. The clause in the contract restricting burial privileges only to members of the Caucasian race and the conduct of the defendants herein violate the public policy of the United States and of the United Nations, as is reflected in its Charter and as is specifically reflected in the Preamble to said Charter and Chapter 1, Article 1 (3), Chapter 4, Article 13-b, and Chapter 9, Articles 55 and 56; and further said clause in the contract and the conduct of the defendants was a direct violation of Articles 55 and 56 of Chapter 9 of the United Nations Charter and of the [fol. 14] plaintiff's rights thereunder, and under Article 6 of the Constitution of the United States this Court is bound by said United Nations Charter.

Par. 16. Even though it might be held that said provision in the contract, Exhibit "A", is constitutional, a fair interpretation of said clause in the contract, Exhibit "A", gives this plaintiff the right to bury anyone of her own choosing in the cemetery lots which she was purchasing since the plaintiff is herself a member of the Caucasian race and it was, therefore, her privilege to bury anyone not a member of the Caucasian race in her lots.

Par. 17. This plaintiff, having entered into said written agreement with the defendant corporation, and having made partial performance of her obligations by paying the sum of $100.00 to the defendant corporation—which was all that was required to be paid at that time—was entitled to the full and complete performance of said contract on the part of the defendants.

Par. 18. The defendants' conduct hereinbefore alleged amounted to a breach of said written agreement.

Par. 19. The breach of said agreement on the part of the defendants was willful and malicious and done with full knowledge that it would result in the damage herein complained of.

Par. 20. As a direct result of said breach of contract, and without any fault on the part of the plaintiff, the plaintiff has been damaged because of humiliation, being held up to public ridicule and contempt, and mental pain and suffering [fol. 15] and nervous upset in the sum of $20,000.00.

Par. 21. In addition thereto, the conduct of the defendants in violating the terms of said written agreement having been committed willfully, maliciously, and with the knowledge that said conduct would harm and grieve the plaintiff, the plaintiff is entitled to recover punitive or exemplary damages in the sum of $40,000.00.

Par. 22. This cause of action is the property of this plaintiff, and said damages, or any part thereof, have not been paid by the defendants, even though demand was made upon them.

Wherefore, plaintiff prays that she be given judgment in the sum of $60,000.00, together with interest thereon at the rate of 5 per cent per annum from the 28th day of August, 1951, the date of the breach of said contract, and for the costs of this action.

Count III

Comes now the plaintiff and in this, her separate and inconsistent cause of action against the defendants, and each of them, respectfully states to the Court:

She incorporates in their entirety by this reference Paragraphs 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, and 15-a of Count I of this petition.

Par. 16. The plaintiff's deceased husband, Sergeant John Rice, had 11/16 Winnebago Indian blood and 5/16 white blood in his veins and was, in truth and in fact, a member of the Caucasian race.

Par. 17. Because he was a member of the Caucasian race, this plaintiff, by the terms of said written agreement Exhibit [fol. 16] "A", was entitled to have her deceased husband buried in the defendants' cemetery.

Par. 18. The defendants by their conduct breached said written agreement, Exhibit "A", and were wrong in concluding that the plaintiff's deceased husband was not a member of the Caucasian race and did, therefore, wrongfully violate the terms of said written agreement.

Par. 18-a. Regardless of whether or not the deceased Sergeant Rice was in fact a member of the Caucasian race, that part of the written contract heretofore referred to as Exhibit "A" and attached to the original petition which reads: "and burial privileges accrue only to members of the Caucasian race," is legally unenforcible for the reason that the phrase "Caucasian race" is so ambiguous and unintelligible and meaningless, and, as a result thereof, the defendants acted without legal right in interpreting said contract to exclude Sergeant Rice from burial in defendants' Cemetery.

Par. 19. The defendants' conduct under the circumstances was willful and malicious, and their breach of said contract was the direct cause of the great humility and mental pain and suffering endured by the plaintiff and resulted further in her being held up to public ridicule and contempt and, as a result thereof, she has been damaged in the sum of $20,000.00.

Par. 20. The breach of said contract by the defendants under the circumstances hereinbefore alleged having been willful, wrongful, and malicious, and done with the knowledge that the plaintiff would suffer the damage herein complained of, the plaintiff is entitled to recover punitive [fols. 17-18] or exemplary damages in the sum of $40,000.00.

Par. 21. This cause of action is the property of the plaintiff, and no part of the damage herein complained of has been paid to her, although demand has been made.

Wherefore, plaintiff prays that she be given judgment in the sum of $60,000.00, together with interest thereon at the rate of 5 per cent per annum from the 28th day of August, 1951, the date of the breach of the contract, and for the costs of this action.

[fol. 19] EXHIBIT "A" TO AMENDED PETITION

M No. 1335

Sioux City Memorial Park Cemetery, Inc.

This Contract, made at Sioux City, Iowa, on this 17 day of August, 1951, between the Sioux City Memorial Park Cemetery, Inc. (owners and developers of Sioux City Memorial Park), its successors and assigns, Party of the First

Part (seller) and Mrs. Evelyn Rice, of Winnebago, Nebr., Party of the Second Part (purchaser), Witnesseth:

That the said Party of the Second Part agrees to purchase from the said Party of the First Part the following: Right of Sepulture in and to So. ½ (spaces 4-5 & 6) Lot 58 in Section Veterans, Sioux City Memorial Park, a burial ground with permanent care as hereinafter provided, a plat of which has been or will be recorded with the Recorder of Deeds in Woodbury County, Iowa, with privilege to exchange said lot before Sepulture for any other unsold lot of the same price and privilege at time of transfer, and to pay therefor the sum of Three hundred & no/100 Dollars (300.00) as follows, to-wit, One hundred & no/100 Dollars ($100.00) cash, the receipt whereof is hereby acknowledged, and Five Dollars ($5.00) on Sept. 20, 1951 and Five Dollars ($5.00) on the 20th day of each month thereafter, until the [fol. 20] said entire purchase money is paid in accordance with the terms of installment note executed by Party of the Second Part.

When the balance due hereunder is paid in full the Party of the First Part shall deliver to the Party of the Second Part a good and sufficient warranty deed conveying said lot for burial purposes only, subject to the rules and regulations of the Sioux City Memorial Park Cemetery.

A permanent care, maintenance and improvement fund has been created by setting aside a minimum of 10 per cent of the gross amount received from all lots sold, with the Woodbury County Savings Bank, Trustee, under a trust agreement whereby the funds must be invested as required by the statutes of the State of Iowa and only the income used for perpetual care.

This agreement is assignable only with the consent of seller, and burial privileges accrue only to members of the Caucasian race, and before any burial can be made the grave space or spaces so used shall be paid in full.

It is further agreed that should any of the foregoing covenants remain unperformed by the said Party of the Second Part for a period of 90 days after the same should have been performed under this contract, then, in that event, the said Party of the First Part may re-enter upon the premises without notice and hold the same as of former

estate, and all the said payments made prior to such re-entry shall be considered as a credit to apply on a future purchase of another lot of the same size if purchased by Party of the Second Part within one year from the date of [fol. 21] such re-entry, at the then prevailing prices and terms of payments.

It is further agreed that time is of the essence of this agreement, and in the event of re-entry by Party of the First Part and failure of Party of the Second Part to purchase another lot within one year of date of such re-entry, then all payments made hereinunder shall become forfeited to Party of the First Part as liquidated damages.

This contract is subject to the rules and regulations and by-laws of the Sioux City Memorial Park Cemetery, Inc. The Party of the Second Part agrees to purchase any grave markers necessary from the Party of the First Part. Only bronze markers may be used in said cemetery, and must be purchased from the Party of the First Part subject to its rules and regulations.

No condition, regulation, or agreement other than those printed hereon or contained in Sioux City Memorial Park Cemetery, Inc., rules and regulations shall be binding upon the seller, and this agreement shall not become effective until executed and approved by an exeutive officer of the Sioux City Memorial Park Cemetery, Inc.

In witness whereof we have hereunto subscribed our names this 17 day of August, 1951.

Sioux City Memorial Park Cemetery, Inc., (S) Mrs. Evelyn Rice, Purchaser. (S) By J. Ben Willey, Sales Representative. Address: Winnebago, Nebr. (S) Approved J. M. Gunnell.

$200.00 Sioux City, Iowa, Aug. 17, 1951

For value received, I promise to pay to order of Sioux City Memorial Park Cemetery, Inc., the sum of Two hundred [fol. 22] & No/100 Dollars, at the office of Sioux City Memorial Park Cemetery, Inc., in Sioux City, Iowa, in installments as follows:

Five Dollars on the 20 day of September, 1951.

Five Dollars on the 20 day of each succeeding month thereafter, until the entire amount of $200.00 has been paid.

(S) Mrs. Evelyn Rice, Purchaser. Address, Winnebago, Nebr.

EXHIBIT "B" TO AMENDED PETITION

STATE OF NEBRASKA,
Thurston County, ss:

Evelyn Rice being first duly sworn on oath deposes and says: That I am the widow of John R. Rice a sergeant first class in the United States Army. That he was killed in action in Korea. That he was a member of the Caucasian race. Further affiant saith not.

Subscribed and sworn to before me this 28th day of August, 1951.

———, Notary Public in and for Thurston County, Nebraska.

EXHIBIT "C" TO AMENDED PETITION

The Truth About the Sgt. Rice Incident

In fairness to our Lot Owners and the citizens of Sioux City and vicinity, who are interested in the Memorial Park, we feel that the many false statements that have been published about this incident should be clarified by a frank [fol. 23] statement of the truth:

1. Contrary to general belief and newspaper publicity, the Sioux City Memorial Park did not solicit the burial of Sgt. Rice.

Mr. D. T. Boyd, the undertaker, of South Sioux City, Nebraska, called and made the appointment to meet Mr. Ben Willey, Sales Manager, at the Park, on August 17, 1951, after, as we were later informed, they had been turned down by two or three other cemeteries. Mr. Boyd, Mrs. Rice and her sister (Mrs. Rice and her sister are both white but married to Indian brothers) met Mr. Willey at the Park,

and Mrs. Rice purchased three spaces on an installment basis and arranged for the burial of Sgt. Rice. Nothing was said about Sgt. Rice being an Indian or that Mrs. Rice lived on the Indian Reservation when the lot was purchased, or prior to the funeral. On the 18th day of August a copy of the contract signed by Mrs. Rice was mailed to her containing the restriction limiting burial to members of the Caucasian Race. The funeral was not held until August 28th. Mrs. Rice had her copy of the contract for ten (10) days, which was ample time for her to inform herself of its contents and restrictions. Mr. Boyd knew, or should have known, about the restriction, as an undertaker of this community whose business is dealing with cemeteries, especially as we have been informed that the burial was turned down by two or three other cemeteries before coming to the Memorial Park. Contrary to publicity, the service by the Catholic priest at Memorial Park was not interrupted and the family had already left the grave site when Mr. Willey [fol. 24] asked the undertaker and was informed that the deceased was an Indian. The body was never lowered into the ground. The first notice that the Park had of the fact that the deceased might be an Indian was that practically all of the mourners at the funeral were Indians.

2. The present Owners and Officers of the Park have no racial prejudice and were not responsible for the restriction to only members of the Caucasian Race.

3. Every contract and deed since the cemetery was started carries this restriction.

4. Dr. R. S. McNeish, of the National Museum at Ottawa, Canada, and other Canadian archaeologists have reported definite proof that American Indians are descended from Wild Mongolian Nomads that came to North America from Asia by way of Alaska. In other words, the American Indian is not of Caucasian descent, to the best of our available information.

If the burial of Sgt. Rice had been permitted, every Lot Owner in the Park could have recourse against the corporation for damages for breach of contract. The officers of the Park are legally bound to enforce and protect its contracts and contract holders—such proceedings could have financially wrecked the Park. Any removal of this restriction

would have to be by agreement of all lot owners, which would be a practical impossibility.

5. The officers of the Park have never at any time retracted from the position first taken, as they could not legally do so.

[fol. 25] 6. The apology so publicized was simply an expression of regret that the officers were legally bound to take the position that they did.

7. Contrary to reports in the press, the officers of the Park did not offer Mrs. Rice any lot in the Memorial Park. The City Council of Sioux City offered any lot in any Sioux City owned cemetery. Mrs. Rice had already contracted for space in Memorial Park which made such an offer on behalf of the Memorial Park unnecessary. As she could not legally use the space already contracted for, you can see that such an offer would be meaningless. We have had many inquiries as to why we did not publicly defend our position during the height of the publicity that was given to this incident. Our failure to do so was in deference to the request of many business men and citizens of Sioux City who wished to end the publicity as quickly as possible, and also to our knowledge of the fact that under this mob hysteria, any statements made by us, as had been demonstrated, would not be fairly reported.

8. The restriction to members of the Caucasian Race is almost as old as the cemetery business and has come down with the development of the cemetery business. This restriction is in probably 90 per cent of the private cemeteries in the United States, including Forest Lawn in California and Graceland Park in Sioux City. Private cemeteries have always had a right to be operated for a particular group such as Jewish, Catholic, Lutheran, Negro, Chinese, etc., not because of any prejudice against any race, but be-

[fol. 26] cause people, like animals, prefer to be with their own kind.

9. It was only in 1947 that racial discrimination was removed from Arlington Cemetery in Washington, D. C. (even privates could not be buried next to officers) and yet we understand that Sgt. Rice is one of the first known Indians to be buried there.

10. We also are considerate of the welfare of the Indian—

a. Why can't he vote?

b. Why can't he buy a bottle of beer?

c. Why are 60,000 Navajo and Hopi Indians living in indescribable squalor, with deaths from tuberculosis, pneumonia, dysentery and starvation tripling their death rate? Half of the children cannot go to school, for there are no schools.

d. What about the thousands of other Indians who died in their country's service without recognition?

e. Why the belated recognition? Any veteran of the United States Armed Services can be buried in Arlington without the President's consent, but it *is restricted to only members of the Armed services.* Many statesmen and outstanding public servants who served their country too, would have preferred burial there, but could not because it was restricted.

We submit the above for your fair and unbiased appraisal.

The Memorial Park, Sioux City, Iowa.

[fol. 27] In District Court of Woodbury County

Demand for Jury Trial

Comes now the plaintiff and demands that all the issues as raised in this case be tried to a jury.

In District Court of Woodbury County

Joint Answer of Defendants to Plaintiff's Amended Petition—Filed December 5, 1952

Come now Defendants and for answer to the Amended Petition of Plaintiff state:

Answer to Count I

1. Admit paragraphs 1 and 2.
2. Deny paragraph 3 for lack of information.

3. Deny paragraph 3-a and specifically state that neither the Plaintiff nor anyone advised Defendants, or any of them, [fol. 28] that Plaintiff's deceased husband was a Winnebago Indian. Further answering said paragraph these Defendants state that had they had any such information they would have refused to sell the said lots to Plaintiff for the reason that all of the lots in Defendant's cemetery which have been sold were sold under a uniform contract, expressly providing that the lots were not to be used for the burial of any persons other than members of the Caucasian Race.

4. Admit paragraphs 4, 5, and 6.

5. Deny paragraph 7 for lack of information.

6. Deny paragraph 8 for lack of information, except admit and allege that following the grave-side ceremonies and immediately prior to interment, Defendant's corporation learned for the first time that the deceased was a Winnebago Indian and thereupon advised the said undertaker that the contract of sale for burial lots prohibited the burial of any body other than that of a Caucasian.

7. Deny paragraph 9 for lack of information.

8. Deny paragraph 10 for lack of information, except admit that Defendant corporation tendered to Plaintiff affidavit referred to in said paragraph as Exhibit "B" and offered to permit the said burial if satisfactory evidence were submitted to the effect that the deceased was a member of the Caucasian Race.

9. Deny paragraphs 11 and 12 for lack of information.

10. Admit that Defendant corporation prepared document referred to in paragraph 13 as Exhibit "C" and state that the said document was prepared for and circulated by De- [fol. 29] fendant only to stockholders and lot owners in Defendant corporation, and specifically deny that the said Exhibit "C" contained any false or misleading statements.

11. Specifically deny paragraph 14.

12. Deny paragraph 15 and specifically deny any of the acts of the Defendants constituted a violation of Plaintiff's rights under any law or Constitution of the State of Iowa or of the United States or contravened public policy. Defendants further deny the conclusion in said paragraph 15 to the effect that the action of a State Court "in condoning" Defendants' acts would constitute a violation of any law or constitution.

13. Deny paragraph 15-a, both as to the facts and the legal conclusion therein contained.

14. Deny paragraph 16.

15. Deny paragraph 17 and specifically allege that if Plaintiff suffered any injury or damage in the premises, the same was solely due to her own failure to observe the terms of the contract, Exhibit "A", and which she freely and voluntarily entered into.

16. Deny paragraphs 18, 19, and 20, except admit that Plaintiff has made demand on Defendants and Defendants have refused said demand.

Answer to Count II

For answer to paragraphs 1 to 14 of Count I incorporated by Plaintiff in Count II, these Defendants incorporate herein their answers to said paragraphs.

1. Deny paragraph 15, both as to the facts and legal conclusions therein contained.

[fol. 30] 2. Deny paragraph 15-a, both as to the facts and legal conclusions therein contained.

3. Deny paragraph 16 and specifically allege that the language in Exhibit "A" therein referred to, refers to the body to be buried and not to the person parchasing or owning the burial lot.

4. Answering paragraph 17, Defendants admit the execution of the contract therein referred to and the payment by Plaintiff, and admit that Plaintiff was entitled to the full and complete performance of the contract on the part of the Defendants, but only upon performance by Plaintiff of the obligations undertaken by her in said contract.

5. Deny paragraph 18.

6. Deny paragraphs 18, 19, 20, 21, and 22, except that these Defendants admit that Plaintiff has made demand as therein alleged.

Answer to Count III

For answer to paragraphs 1 to 15-a of Count I incorporated in Count III, these Defendants incorporate herein their answer to said paragraphs.

1. Admit that Plaintiff's deceased husband was eleven-sixteenths (11/16) Winnebago Indian and five-sixteenths (5/16) white as alleged in paragraph 16; deny, however, the

conclusion in the said paragraph that said deceased was a member of the Caucasian Race and allege that he was in fact an Indian.

2. Deny paragraphs 17 and 18.

3. Deny paragraph 18-a and specifically deny that the term "Caucasian Race" as used in the contract, Exhibit "A", is "ambiguous, unintelligible and meaningless," and state the [fols. 31-33] fact to be that the said term had a definite and well-understood meaning at the time and place in question, and was generally understood by all persons, including the Plaintiff, to mean a person having such a percentage of Caucasian or white blood as to be generally recognized and referred to as a white person.

4. Deny paragraphs 19, 20, and 21, except admit demand.

Wherefore, these Defendants pray that Plaintiff's Petition be dismissed and for costs.

[fol. 34] In District Court of Woodbury County

Court's Ruling on Defendants' Motion to Dismiss Plaintiff's Petition as Amended—Filed April 21, 1952

Now, to wit: on this 21st day of April, 1952, it being a day of the regular March, 1952 Term of this court, this matter having heretofore come on for hearing before the Honorable R. W. Crary, a judge of this court, on the Motion of the defendants herein to dismiss the petition of the plaintiff, together with the defendants' motion to dismiss plaintiff's second amendment, with Kindig & Beebe and Neil McCluhan [fol. 35] appearing as attorneys for the plaintiff, and Shull & Marshall and Harper, Gleysteen & Nelson appearing as attorneys for the defendants, and said motions having been argued orally and written briefs and arguments having been filed with the court, and the said motions having been fully submitted and the court duly advised in the premises, rules thereon as follows:

1. That defendants' Motion to Dismiss be and the same is overruled as to Counts I, Ii and III of the plaintiff's petition filed herein.

2. That the defendants' Motion to Dismiss plaintiff's second amendment wherein plaintiff pleads that the restrictive clause in the contract described in plaintiff's petition is violative of the United Nations Charter, is hereby sustained.

IN DISTRICT COURT OF WOODBURY COUNTY

DEFENDANTS' FIRST APPLICATION TO THE COURT TO ADJUDICATE LAW POINTS PRIOR TO TRIAL—Filed April 23, 1952

Come now the Defendants, Sioux City Memorial Park Cemetery, Inc., and Defendants, F. K. Lytle and J. M. Gunnell, as individuals, and jointly and severally apply to the Court to separately hear and determine the following points of law raised in the pleadings herein and which points of law appear after issues joined.

1. Whether or not the Petition and amendments thereto, state any claim upon which relief can be granted as against the individual Defendants, F. K. Lytle and J. M. Gunnell.
[fol. 36] 2. Whether or not Plaintiff's contract, Exhibit "A", attached to her Petition, as alleged in amended Paragraph 15 of Count I, amended paragraph 15 of Count II, and amended paragraph 15 of Count III, is void and unenforceable as a violation of:

(a) The Fifth Amendment to the United States Constitution,
(b) The Fourteenth Amendment to the United States Constitution, and
(c) Sections 1 and 6 of Article I of the Constitution of the State of Iowa.

3. Whether or not the contract, Exhibit "A", attached to Plaintiff's Petition, should be interpreted, as alleged in paragraph 16 of Count II, to give the Plaintiff the right to bury anyone of her own choosing regardless of race in the cemetery lots in question, on the ground that she, the Plaintiff, is a member of the Caucasian Race; or whether the said contract refers to the race of the person or thing to be buried, rather than to the race of the owner of the lot.

4. Whether or not a person alleged to be of eleven-sixteenths (11/16) Winnebago Indian blood and five-sixteenths

(5/16) white blood, as stated in paragraphs 16, 17, and 18 of Count III, is a person of the Caucasian Race within the meaning of the term as used in the contract, Exhibit "A"

5. Whether or not the action of a State or Federal Court "condoning Defendants' conduct" in permitting Defendant to stand upon the terms of its contract and to defend this action in Court would constitute State or Federal action contrary to the Fifth Amendment and Fourteenth Amend- [fol. 37] ment to the United States Constitution, as alleged by Plaintiff in amended paragraph 15 of Count I.

6. Whether or not the acts of the Defendant, Sioux City Memorial Park Cemetery, Inc., alleged in amended Paragraphs 15 of Count I and 15 of Count II constitute, as a matter of law, a violation of "public policy."

7. Whether or not the term "Caucasian Race" as used in the contract, Exhibit "A" is legally unenforceable for the reason that the same is "ambiguous, unintelligible and meaningless," as alleged in paragraph 18-a of amended Count III of the Petition.

IN DISTRICT COURT OF WOODBURY COUNTY

PLAINTIFF'S APPLICATION FOR ADJUDICATION OF LAW POINTS PRIOR TO TRIAL—Filed May 8, 1952

Comes now the plaintiff, Evelyn Rice, and applies to this Court to separately hear and determine the following points of law raised in the pleadings herein, issues having been joined:

1. Whether or not the plaintiff's contract, Exhibit "A", attached to her petition, as alleged in amended Paragraph 15 of Counts I and II, is void and unenforcible as a violation of:

(a) The Fifth Amendment to the United States Constitution.

(b) The Fourteenth Amendment to the United States Constitution.

(c) Sections 1 and 6 of Article I of the Constitution of the State of Iowa.

(d) Public policy of the State of Iowa and of the United States Government.

[fol. 38] 2. Whether or not the contract, Exhibit "A", attached to plaintiff's petition, should be interpreted, as alleged in paragraph 16 of Count II, to give the plaintiff the right to bury anyone of her own choosing, regardless of race, in the cemetery lots in question, on the ground that she, the plaintiff, is a member of the Caucasian Race; or whether the said contract refers to the race of the person or thing to be buried, rather than to the race of the owner of the lot.

3. Whether, as a matter of law, a person alleged to be of 11/16 Winnebago Indian blood and 5/16 White blood, as stated in paragraphs 16, 17, and 18 of Count III, is a person of the Caucasian Race within the meaning of the term as used in the contract, Exhibit "A".

4. Whether or not the action of a State Court "condoning defendants' conduct" in permitting defendant to stand upon the terms of its contract and to defend this action in Court would constitute State action contrary to the Fourteenth Amendment to the United States Constitution.

5. Whether the provision of the contract, Exhibit "A", restricting burial privileges to members of the Caucasian Race is enforcible.

6. Whether the provision in the contract, Exhibit "A", restricting burial privileges to members of the Caucasian Race can be relied upon as a defense.

7. Whether or not the term "Caucasian Race" as used in the contract, Exhibit "A", is as a matter of law legally unenforcible for the reason that the same is "ambiguous, unintelligible and meaningless," as alleged in paragraph [fol. 39] 18-a of amended Count III of the petition.

8. Whether or not the United Nations Charter announces a controlling policy in this matter which does prohibit this Court from giving any legal credence to or condoning of the restrictive covenant in question, as alleged in Paragraph 15-a of Counts I and II of plaintiff's amended petition.

In District Court of Woodbury County

Court's Ruling on Defendants' Application to Adjudicate Law Points—July 8, 1952

Now, to wit: On this 8th day of July, 1952, the court after having oral and written arguments and being duly advised in the premises, rules as follows on the Application of the defendants herein for an adjudication as to law points under Rule 105 R. C. P.:

1. That the petition as amended does not state a claim upon which relief could be granted against the defendants F. K. Lytle and J. M. Connell as individuals.

2. That the racial restrictive clause in plaintiff's contract, Exhibit "A", attached to plaintiff's petition, as alleged in amended paragraph 15 of Count I, amended paragraph 15 of Count II, and amended paragraph 15 of Count III, is not void but is unenforceable as a violation of:

(a) The Fifth Amendment of the United States Constitution.

(b) The Fourteenth Amendment to the United States Constitution, and

[fol. 40] (c) Sections 1 and 6 of Article I of the Constitution of the State of Iowa.

3. That the restrictive clause in the contract, Exhibit "A", attached to plaintiff's petition, refers to the race of the person or thing to be buried, rather than to the race of the owner of the lot.

4. That a person alleged to be of eleven-sixteenths Winnebago Indian blood and five-sixteenths white blood is not, as a matter of law, a person of the Caucasian race within the meaning of the term as used in the contract, Exhibit "A".

5. That the action of a State or Federal court in permitting a defendant to stand upon the terms of its contract and to defend this action in court would not constitute state or federal action contrary to the Fifth Amendment and the Fourteenth Amendment to the United States Constitution, as alleged by plaintiff in amended paragraph 15 of Count I.

6. That the acts of the defendants alleged in amended

paragraphs 15 of Count I and 15 of Count II do not constitute a violation of "public policy" as a matter of law.

7. That the term "Caucasian Race" as used in the contract, Exhibit "A", is not "ambiguous, unintelligible and meaningless," as alleged in paragraph 18-a of amended Count III of plaintiff's petition.

[fol. 41] IN DISTRSCT COURT OF WOODBURY COUNTY

COURT'S RULING ON PLAINTIFF'S APPLICATION TO ADJUDICATE LAW POINTS—Field July 8, 1952

Now, to wit: On this 8th day of July, 1952, the court after having oral and written arguments and being duly advised in the premises, rules as follows on the Application of the plaintiff herein for an adjudication as to law points under Rule 105 R. C. P.:

1. That the racial restrictive clause in plaintiff's contract, Exhibit "A", attached to plaintiff's petition, as alleged in amended paragraph 15 of Count I, amended paragraph 15 of Count II, and amended paragraph 15 of Count III, is not void but is unenforceable as a violation of:

(a) The Fifth Amendment to the United States Constitution.

(b) The Fourteenth Amendment to the United States Constitution.

(c) Sections 1 and 6 of Article I of the Constitution of the State of Iowa.

(d) Public policy of the State of Iowa and of the United States Government.

2. That the restrictive clause in the contract, Exhibit "A", attached to plaintiff's petition, refers to the race of the person or thing to be buried, rather than to the race of the owner of the lot.

3. That a person alleged to be of eleven-sixteenths Winnebago Indian blood and five-sixteenths white blood is not, as a matter of law, a person of the Caucasian race within the meaning of the term as used in the contract, Exhibit "A".

4. That the action of a State or Federal court in permitting a defendant to stand upon the terms of its contract and to defend this action in court would not constitute state [fol. 42] or federal action contrary to the Fifth Amendment and the Fourteenth Amendment to the United States Constitution, as alleged by plaintiff in amended paragraph 15 of Count I.

5. That the provision of the contract, Exhibit "A", restricting burial privileges to members of the Caucasian race is unenforceable.

6. That the provision in the contract, Exhibit "A", restricting burial privileges to members of the Caucasian race may be relied upon as a defense.

7. That the term "Caucasian Race" as used in the contract, Exhibit "A", is not "ambiguous, unintelligible and meaningless," as alleged in paragraph 18-a of amended Count III of plaintiff's petition.

8. That the United Nations Charter has no legal effect as to the legality or illegality of the provisions of the contract involved herein, or of the rights of the parties thereto.

In District Court of Woodbury County

Application for Permission to Have Interlocutory Appeal to the Supreme Court

Comes now the plaintiff, Evelyn Rice, and in this her application for permission to appeal from an interlocutory ruling of the District Court respectfully states:

1. At the request of the plaintiff and the defendants to the above-entitled cause, the District Court of Iowa, in and for Woodbury County, did on the 8th day of July, 1952 make its separate adjudication of law points in advance of [fol. 43] trial under Rule 105 of the Rules of Civil Procedure.

2. Said adjudication of law points involves matters material to the ultimate disposition of this litigation and involves the essence of the action as to both the plaintiff and the defendants and will materially affect the final decision, and a determination of the correctness of the Trial Court's

adjudication of law points prior to the trial of the case on its merits will better serve the interests of justice.

3. The amount in controversy, as is indicated by the pleadings, exceeds $300.00.

4. All of the defendants, through their attorneys, consent to this interlocutory appeal and stipulation and agree that an order authorizing this appeal may be made without further notice as is shown in the stipulation hereto attached and marked Exhibit "A", and by this reference made a part hereof.

Wherefore, plaintiff prays for an order granting such appeal without further notice or hearing, and further prays that such appeal may be granted on terms advancing it for prompt summation, and that such appeal may be taken without the necessity of a bond being filed, and for such other and further things as to the Court may seem appropriate in the premises.

Dated this ..... day of July, 1952.

[fol. 44] EXHIBIT "A" TO APPLICATION

Stipulation

It is hereby stipulated between Neil R. McCluhan and Kindig & Beebe, attorneys for the plaintiff, and Shull & Marshall and Harper, Gleysteen & Nelson, attorneys for the defendants in the above-entitled cause, as follows:

1. The statements found in plaintiff's application for an order authorizing interlocutory appeal are correct.

2. A copy of said application has been served upon the defendants' attorneys, and they acknowledge receipt thereof and waive any further requirement of notice of said application or of a hearing on said application and do expressly agree and consent to an order being entered immediately authorizing the plaintiff to appeal from the District Court's ruling on the adjudication of law points in advance of trial, and that said adjudication of law points is material to the rights of the parties to this litigation and that it is in the best interests of justice that this interlocutory appeal be allowed.

3. All of the attorneys further agree and consent to advancing this appeal for prompt summation to the Court and that no bond shall be required pending the appeal.

Dated this — day of July, 1952.

IN DISTRICT COURT OF WOODBURY COUNTY

ORDER ON APPLICATION FOR PERMISSION TO APPEAL FROM INTERLOCUTORY RULING—August 2, 1952

Plaintiff's Application for an appeal from an interlocutory order of the District Court adjudicating certain law points under R. C. P. 105, having heretofore been [fol. 45] presented to the undersigned Judge of the Supreme Court of Iowa and by said Judge presented to other members of the Court:

It is ordered that said appeal be and the same is hereby denied.

Done at Sioux City, Iowa, this 2 day of August, 1952.

IN DISTRICT COURT OF WOODBURY COUNTY

DEFENDANT'S SECOND APPLICATION FOR ADJUDICATION OF LAW POINTS—Filed December 6, 1952

Defendants jointly apply to the Court for an adjudication of points of law as follows, and for the following reasons:

1. Defendants request the Court to rule as a matter of law that the publication of the pamphlet referred to in plaintiff's pleading as Exhibit "C" and the nature and character of said pamphlet, and whether or not the said pamphlet and its publication constituted an actionable wrong, presents no jury question and that the Court should hold as a matter of law that the said pamphlet and its publication is not libelous, defamatory or actionable as alleged by plaintiff.

2. Defendants further request the Court to rule that the only issue remaining in this cause is whether or not the moving of the body of Sergeant John Rice as alleged

in plaintiff's pleading violated any rights of plaintiff with resultant damages to her.

3. Defendants further ask the Court to rule that as a matter of law plaintiff may introduce evidence at the trial in support only of issues remaining, and not heretofore [fol. 46] ruled upon adversely to the claims of plaintiff.

In District Court of Woodbury County

Court's Ruling on Defendant's Second Application for Adjudication of Law Points

This Matter comes on for ruling upon application of defendants for adjudication of law points, said application being dated December 6, 1952; plaintiff being represented by her attorneys of record, Kindig & Beebe and Neil McCluhan, and defendants being represented by their attorneys of record, Harper, Gleysteen & Nelson and Shull & Marshall, and the Court having examined said application and heard arguments of counsel in connection therewith, and having taken the matter under advisement:

Now, on this 16th day of December, A. D. 1952, the Court makes the following Findings of Facts, Conclusions of Law and Order;

Findings of Fact

1. The matters upon which this application is based are three in number and will be treated in the order appearing in said application. However, a recital of the background of this case seems appropriate for an understanding of the Court's position on the matters now before it.

2. Originally this case was premised upon an alleged breach of contract, plaintiff contending that restrictions contained in the contract contravened provisions of both the federal and state constitutions, as well as of the United [fol. 47] Nations Charter. Plaintiff further contended that if said restrictions in the contract were void because of the objections raised by plaintiff, then defendant breached said contract to the damage of plaintiff.

3. As elements of damage to plaintiff, the plaintiff alleged as the primary injury to herself, the failure of defendant to inter the remains of her late husband, with resulting damage caused by humiliation, mental distress, etc.; and in addition she alleged that said injuries and resulting damages were increased by (1) moving the body of her deceased husband from the graveside to a building belonging to defendant corporation, and without the consent of plaintiff, and (2) by publication of a pamphlet explaining the incident which was the basis of the lawsuit.

4. The petition does not allege that the moving of the body constituted a tort nor that such moving was wrongful in itself, but only that said moving of the body was one of the elements of damage that resulted to plaintiff from defendant's alleged breach of contract. Likewise, the petition does not allege that the pamphlet circulated was libelous nor defamatory, nor that its publication constituted a tort. Again it is plaintiff's contention only that its publication, though not libelous or defamatory nor wrongful in itself, added to the damage caused by the claimed breach of contract.

5. The Court by previous rulings upon applications for adjudication of law points eliminated from this case the claim by plaintiff of breach of contract, and after said rulings the only matters remaining for determination [fol. 48] were the moving of the body, and the publication of the pamphlet, Exhibit "C". The Court had not previously been asked to rule upon these latter two questions.

6. It appears to the Court, that since the petition does not have a right of recovery upon any claim of tort arising out of either the moving of the body or the publication of the pamphlet, but alleges them only as elements of damage, and plaintiff's counsel adheres to this position and so contends in oral argument to the Court, and with the alleged wrongful act of defendant, to wit: breach of contract, having heretofore been eliminated from the case by ruling of the Court, that nothing remains to submit to a jury or to be determined by a court. If the wrong complained of, that is the breach of contract, is no longer in the lawsuit, there is nothing left upon which to base damages, the allegations of which alone remain in the case.

7. The allegation of wrongdoing having been eliminated

by prior rulings of the Court, such rulings of necessity carried with them the damage it is claimed flowed from said alleged wrongdoing.

8. Had these matters been set forth in separate counts as tort feasance a different result might have obtained. But since it is plaintiff's contention that they constitute merely cumulative elements of damage no allegation of wrongdoing remains in the case, and damages must flow from allegations of wrongdoing on the part of the defendant and cannot be recovered from a mere recital of the damages alleged to have been suffered.

[fols. 49-50] CONCLUSIONS OF LAW

1. The Court Finds that it has full and complete jurisdiction of the subject matter and the parties.

2. That the Application of defendants for adjudication of law points filed by defendants December 6, 1952, should be ruled on by the Court in accordance with the application and request of the defendants.

Wherefore, it is ordered, adjudged and decreed

That, unless plaintiff shall amend her pleadings within seven (7) days hereof as provided by Rule 86, Rules of Civil Procedure, the said cause shall be dismissed at plaintiff's costs.

Plaintiff excepts.

[fols. 51-52] On December 5, 1952 the following was filed:

[fol. 63] Filed September 22, 1953

IN THE SUPREME COURT OF IOWA

Nos. 102, 48304

EVELYN RICE, Appellant,

v.

SIOUX CITY MEMORIAL PARK CEMETERY, INCORPORATED, a Corporation; F. K. LYTLE and J. M. GUNNELL, Appellees

Appeal from Woodbury District Court, Ralph C. Pritchard and Ralph W. Crary, Judges

Action at law for damages for defendants' refusal to bury plaintiff's alleged non-Caucasian husband in a private cemetery burial lot purchased by plaintiff under a contract restricting burial privileges to members of the Caucasian race. The case was decided on rulings on questions of law under Rule 105 R. C. P. in favor of defendants. Affirmed.

Neil R. McCluhan of Winnebago, Nebr., and Kindig & Beebe of Sioux City, for appellant.

Shull & Marshall, and Harper, Gleysteen & Nelson, of Sioux City, for appellees.

[fol. 64] LARSON, J.;

Plaintiff commenced her action for damages against the defendants by filing a petition in three counts, which was later twice amended and still later ordered recast. In a case of the same entitlement found in 102 Fed. Suppl. 658, the petition is set out in full. In this opinion by Judge Graven the case was remanded to the state court for final adjudication on the issues, due to a jurisdictional question. The action against the individual defendants was dismissed below and no appeal is taken from that decision of the court.

Plaintiff in her petition alleges that on or about August 17, 1951, she entered into a written contract "Exhibit A" for the purchase of three cemetery lots belonging to defendant corporation, one lot to be used for the burial of her deceased husband, Sergeant Rice, whose body was be-

ing shipped home from Korea. This contract contains a racial restrictive clause and provides in part as follows:

"M. No. 1335.

Sioux City Memorial Park Cemetery, Inc.

This contract, made at Sioux City, Iowa, on this 17th day of August, 1951, between the Sioux City Memorial Park Cemetery, Inc. (owners and developers of Sioux City Memorial Park, its successors and assigns, Party of the First Part (seller) and Mrs. Evelyn Rice, of Winnebago, Nebr., Party of the Second Part (purchaser), Witnesseth:

"That the said Party of the Second Part agrees to purchase from the said Party of the First Part the following:

Right of Sepulture in and to So. ½ (spaces 4-5 & 6) Lot 58 in Section Veterans, Sioux City Memorial Park, a burial [fol. 65] ground with permanent care as hereinafter provided, a plat of which has been or will be recorded with the Recorder of Deeds in Woodbury County, Iowa, with privilege to exchange said lot before Sepulture for any other unsold lot of the same price and privilege at time of transfer * * *

"This agreement is assignable only with the consent of seller, and burial privileges accrue only to members of the Caucasian race, and before any burial can be made the grave space or spaces so used shall be paid in full.

"This contract is subject to the rules and regulations and by-laws of the Sioux City Memorial Park Cemetery, Inc. The Party of the Second Part agrees to purchase any grave markers necessary from the Party of the First Part. Only bronze markers may be used in said cemetery, and must be purchased from the Party of the First Part subject to its rules and regulations.

"No condition, regulation, or agreement other than those printed hereon or contained in Sioux City Memorial Park Cemetery, Inc. rules and regulations shall be binding upon the seller, and this agreement shall not become effective until executed and approved by an executive officer of the Sioux City Memorial Park Cemetery, Inc."

Plaintiff alleged that her deceased husband, Sergeant John Rice, killed in combat on active duty in Korea, had

1/16 Winnebago Indian blood and 5/16 white blood, and hat defendant cemetery refused to permit the body of her leceased husband to be lowered into the ground, after graveside services were held, caused the body to be removed rom the grave site and advised her that the refusal was ecause "he was not a Caucasian."

Plaintiff further alleged that defendant cemetery pub-ished a pamphlet explaining its action in refusing the urial, which caused her humiliation and suffering. In fol. 66] each count she asked judgment in the sum of $60,-00. The pamphlet filed as Exhibit C is in part as follows:

"The Truth About the Sgt. Rice Incident.

"In fairness to our Lot Owners and the citizens of Sioux ity and vicinity, who are interested in the Memorial Park, e feel that the many false statements that have been pub-shed about this incident should be clarified by a frank tatement of the truth:

"1. Contrary to general belief and newspaper publicity he Sioux City Memorial Park did not solicit the burial f Sgt. Rice.

"Mr. D. T. Boyd, the undertaker of South Sioux City, ebraska, called and made the appointment to meet Mr. en Willey, Sales Manager, at the Park on August 17, 951, after, as we were later informed, they had been rned down by two or three other cemeteries. Mr. Boyd, rs. Rice and her sister (Mrs. Rice and her sister are oth white but married to Indian brothers) met Mr. Willey t the Park and Mrs. Rice purchased three spaces on an stallment basis and arranged for the burial of Sgt. Rice. othing was said about Sgt. Rice being Indian or that Mrs. ice lived on the Indian Reservation when the lot was rchased, or prior to the funeral. On the 18th day of ugust a copy of the contract signed by Mrs. Rice was ailed to her containing the restriction limiting burial to embers of the Caucasian race. The funeral was not held til August 28th. Mrs. Rice had had her copy of the ntract for ten (10) days, which was ample time for her inform herself of its contents and restrictions. Mr. oyd knew, or should have known, about the restriction, as undertaker of this community whose business is dealing

with cemeteries, especially as we have been informed that the burial was turned down by two or three other cemeteries before coming to the Memorial Park. Contrary to [fol. 67] publicity, the service by the Catholic priest at Memorial Park was not interrupted and the family had already left the grave site when Mr. Willey asked the undertaker and was informed that the deceased was an Indian. The body was never lowered into the ground. The first notice the Park had of the fact that the deceased might be an Indian was that practically all of the mourners at the funeral were Indians.

"2. The present Owners and Officers of the Park have no racial prejudice and were not responsible for the restriction to only members of the Caucasian race.

"3. Every contract and deed since the cemetery was started carries this restriction.

"4. Dr. R. S. McNeish of the National Museum at Ottawa, Canada, and other Canadian archaeologists have reported definite proof that American Indians are descended from Wild Mongolian Nomads that came to North America from Asia by way of Alaska. In other words, the American Indian is not of Caucasian descent, to the best of our available information.

"If the burial of Sgt. Rice had been permitted, every Lot Owner in the Park could have recourse against the corporation for damages for breach of contract. The officers of the Park are legally bound to enforce and protect its contracts and contract holders—such proceedings could have financially wrecked the Park. Any removal of this restriction would have to be by agreement of all lot owners, which would be a practical impossibility.

"5. The officers of the Park have never at any time retracted from the position first taken, as they could not legally do so.

"6. The apology so publicized was simply an expression of regret that the officers were legally bound to take the [fol. 68] position they did.

"7. Contrary to reports in the press, the officers of the Park did not offer Mrs. Rice any lot in the Memorial Park. The City Council of Sioux City offered any lot in any Sioux City owned cemetery. Mrs. Rice had already contracted for space in Memorial Park which made such an offer on

behalf of the Memorial Park unnecessary. As she could not legally use the space already contracted for, you can see such an offer would be meaningless. We have had many inquiries as to why we did not publicly defend our position during the height of the publicity that was given to this incident. Our failure to do so was in deference to the request of many business men and citizens of Sioux City who wished to end the publicity as quickly as possible, and also to our knowledge of the fact that under this mob hysteria, any statements made by us, as had been demonstrated, would not be fairly reported.

"8. The restriction to members of the Caucasian race is almost as old as the cemetery business and has come down with the development of the cemetery business. This restriction is in probably 90 per cent of the private cemeteries in the United States, including Forest Lawn in California and Graceland Park in Sioux City. Private cemeteries have always had a right to be operated for a particular group such as Jewish, Catholic, Lutheran, Negro, Chinese, etc., not because of any prejudice against any race, but because people, like animals, prefer to be with their own kind." * * *

"We submit the above for your fair and unbiased appraisal.

The Memorial Park, Sioux City, Iowa."

Both defendants and plaintiff moved for an adjudication of substantially the same points of law under Rule 105 R.C.P. and the court ruled:

[fol. 69] That the social restriction clause in the contract Exhibit A is not void but is unenforceable as a violation of (a) The Fifth Amendment of the United States Constitution; b. The Fourteenth Amendment to the United States Constitution, and (c), Sec. 1 and 6 of Art. I of the Constitution of the State of Iowa; (d) Public Policy of the State of Iowa and of the United States Government;

That the restrictive clause in the contract Exhibit A refers to the race of the person or thing to be buried, rather than to the race of the owner of the lot;

That a person alleged to be 11/16 Winnebago Indian and 5/16 white blood, is not, as a matter of law, a person of the

Caucasian race within the meaning of the term as used in the contract;

That the action of a state or federal court in permitting a defendant to stand upon the terms of its contract and to defend this action in court would not constitute state or federal action contrary to the 5th and 14th amendments to the United States Constitution;

That the acts of the defendants alleged do not constitute a violation of "public policy" as a matter of law;

That the term "Caucasian Race" as used in the contract Exhibit A, is not "ambiguous, unintelligible, and meaningless" and

That the United Nations Charter has no legal effect as to legality or illegality of the provisions of the contract involved herein, or of the rights of the parties hereto.

We denied an application for interlocutory appeal and thereafter on December 6, 1952, defendants made a second application to the district court to adjudicate points of law remaining. The court found this action was originally premised upon an alleged breach of contract, and as elements of [fol. 70] damage, plaintiff listed her injury as humiliation, mental distress, etc. increased by (1) the moving of the body after it was ready to be lowered into the ground, and (2) by the publication of a pamphlet explaining the incident complained of by plaintiff. The court further found no independent tort action involved and having ruled against plaintiff on her claim for breach of contract, there was nothing left upon which to base damages, the only allegation remaining in the petition, after all allegations of wrongdoing were removed, by the court's rulings on points of law. We agree.

Plaintiff relies upon and argues six alleged errors but her main contention is that the court erred in holding, as a matter of law, that the racial restrictive clause in the admitted contract was not void, and that the action of the court in permitting the defendants to stand upon its terms and defend thereunder this action for damages in court would not amount to nor constitute state or federal action contrary to the 5th amendment or the 14th amendment to the United States Constitution or the Constitution of Iowa. (Sec. 1, Art. 1, or Sec. 6, Art. 1).

We shall discuss this contention first and address ourselves to the contract rather than tort features of plaintiff's complaint. The complaint sounding in tort will be later considered.

It is strongly contended by plaintiff that the whole field of law on the subject of restrictive covenants was completely changed by pronouncements of the U. S. Supreme Court in the cases of Shelley v. Kraemer, 334 U. S. 1, 86 S. Ct. 836, 92 L. Ed. 1161, 3 A. L. R. 2d 441, and Hurd v. Hodges, 334 U. S. 24, 68 S. Ct. 847, 92 L. Ed. 1187, which hold in effect that affirmative action of state courts by granting injunctions, specific performance and other active aids to the enforcement of restrictive covenants based on color or race, was state action and violated the 5th and 14th amendments of [fol. 71] the United States Constitution. In this group of cases it is to be noted that the state has lent its power in support of the actions of private individuals or corporations and of course, in so doing has clothed the private acts with the character of state action. While we must recognize an evolution of our society as disclosed by these recent decisions, all of the previous decisions may be distinguished from our present case in that they disclose the exertion of governmental power directly to aid in discrimination, or other deprivation of right. Certainly, that factor is not presented here where the state has maintained neutrality. But plaintiff would have us go one step further than the United States Supreme Court and declare any private contract, which contains any restrictive covenants, void as to the covenants. She is asking more. She asks us to reform the contract voluntarily agreed to with another private party. She asks that we remove the restrictive covenant in her contract which she repudiates and permit her to recover damages from the other party. In other words extend the theory announced in the Shelley v. Kraemer and Hurd v. Hodges cases to indirect as well as direct support of private agreements containing restrictive covenants; to bar the recognition of such clauses in contracts between private parties even though no active aid is given their enforcement. This theory the district court would not adopt and we think properly declined to do so. Our sympathy must not be allowed to carry us to the aid of either party in circumstances of this nature unless the restriction

is clearly one against public policy. It may be desirable to hold that state action can be discerned in any case where the state has tolerated discrimination by inaction, or otherwise, in matters of public importance, and we are in sympathy with the ideals of race equality. But there is danger [fol. 72] in attempting a remedy by such constitutional expansion. Invocation of the constitution then might depend upon a balance of two asserted values—the privilege of the private corporation v. the right of the plaintiff to equality of treatment which is another well known constitutional safeguard. It must be clear that a clash would result between such expansion of the 14th amendment and the decisions of long standing in the civil rights cases. 109 U. S. 3, 3 S. Ct. 18, 27 L. Ed. 835. Both demand that the states protect the rights defined in the amendment against the wrongful actions of private individuals. This most states do by appropriate legislation and it is just and proper that state authorities furnish appropriate means of extending these moral rights into areas when they have not heretofore been asserted, rather than to try an extension of the coverage of the 14th amendment to fields that will abridge other individual rights, and violate other constitutional guarantees.

It is well to mention here that the proper state authority, the 1953 Iowa legislature in Chap. 84, Acts of the 55th G. A. Sec. 1, and Sec. 8, did expand the Iowa civil rights law to cover just such incidents as arose in this case, but it is also worthy of note that by exceptions this legislation did not abridge desirable individual rights of restriction in church and fraternal private burial places. Such proper discretion could not occur under plaintiff's urged expansion of constitutional construction.

It seems to us that the unquestioned value of the present system prescribes the limits to this expanding concept of state action. As said in the case of Dorsey v. Stuyvesant Town Corp., 299 N. Y. 512, 87 N. E. 2d 541, 14 A. L. R. 2d 133, Cert. denied, 339 U. S. 981, 70 S. Ct. 1019, 94 L. Ed. 1385.

"The unquestioned value of that system (state responsibility) suggests the limits to the expanding concept of [fol. 73] state action, which has hitherto been found only in cases where the state has consciously exerted its power

in aid of discrimination or where private individuals have acted in a governmental capacity so recognized by the State."

In order to seek money damages, plaintiff seeks to justify her repudiation of a portion of her contract and recover on a breach of the new agreement, but admits that Iowa had not seen fit to declare such private cemeteries within the "civil right" (Chap. 735, Code 1950) laws of this state. Having named such things as lodging houses, restaurants and places of amusement, the defendants were not acting in violation of Iowa law, and the expression "expressio unius est exclusio alterius" is applicable here.

Our conclusion then must be that the moral ends advanced by plaintiff will not justify the means she sought to obtain them. Defendants cannot be held to answer in damages for its contractual provisions under the equal protection clauses of either Federal or State constitutions. Plaintiff did not strenuously argue that the State constitution in Sec. 1, Art. 1, and Sec. 6, Art. 1, did more than reenunciate the restrictions of the 5th and 14th amendments of the United States Constitution. The problem is the same under each constitution and our decision must necessarily be the same in each case. Prohibitions relating to cases of this kind contained in the 5th and 14th amendments of the U. S. Constitution and the State Constitution, Sec. 1 and 6 of Art. 1, related only to state action. It is clear that state action as referred to here has been only expanded to direct action by the legislative, the executive, the judicial authorities or any person or group exercising a governmental function, to aid in the enforcement of restrictive or discriminating acts or agreements. For the reasons set out we can expand it no further and therefore find no error in the lower [fol. 74] court's determination of these points of law.

II. But plaintiff further urges that the restrictive covenants violate "public policy" and the treaty embodied in the Charter of the United Nations.

It will suffice to say that that treaty has no application to the private conduct of individual citizens of the United States. It is true a principle was enunciated in that treaty but claims or fears that state laws have been abrogated by the provisions of the Charter of the United Nations, have been dissolved by the California

and Michigan courts. In Sipes v. McGhee, 316 Mich. 614, 25 N. W. 2d 638, 644, a case reviewed by the United States Supreme Court, there was a reversal on constitutional grounds but no criticism of the state court's expression as to the general law relative to treaties. The Michigan Supreme Court said: "We do not understand it to be a principle of law that a treaty between sovereign nations is applicable to the contractual rights between the citizens of the United States when a determination of these rights is sought in the state courts. So far as the instant case is concerned, these pronouncements (Art. 55, 56, United Nations Charter) are merely indicative of a desirable social trend and an objective devoutly to be desired by all well-thinking peoples." With this statement we agree.

The Supreme Court of California in 242 P. 2d 617, at 622, 32 Cal. 2d 718, reviewing the decision in Jujii v. State of California, D. C. Appl. 217 P. 481, held: "We are satisfied, however, that the charter (United Nations) provisions relied on by plaintiff were not intended to supersede existing domestic legislation and we cannot hold that they operate to invalidate the Alien Land Law."

We also must come to the conclusion here that desirable as these principles announced in the charter may be, they do not have the force or effect of superseding our state laws relating to contracts, and must therefore hold that [fol. 75] the provisions of the United Nations charter have no bearing on the case before the court.

Plaintiff lays great stress on her claim that a racial restriction in a private agreement such as we have here must be declared void as violating public policy. This is a typical argument in cases of this kind and admittedly has caused courts some difficulty. The greatest of these difficulties is that of determining the meaning of "public policy." Plaintiff refers to several cases where the courts have held against racial discrimination in public schools, in transportation and food establishments, and points to this as Iowa's public policy. A closer examination of these cases discloses that this designated public policy was not set by the courts but by the legislative branch. It is true that in interpreting various civil rights acts, and other police power enactments, the courts do and have expressed the public policy of the state, as is indicated by the people

through the legislature. In the case of Richmond v. Dubuque & Sioux City R. R. Co., 26 Iowa 191, we said: "But further than this, the power of courts to declare a contract void for being in contravention of sound public policy, is a very delicate and undefined power and like the power to declare a statute unconstitutional, should be exercised only in cases free from doubt."

In the case of Liggett v. Shrives, 181 Iowa 260, 164 N. W. 611, 612, we said: "We must look to the Constitution, statutes, and judicial decisions of the state to determine its public policy, and that which is not prohibited by statute, condemned by judicial decision nor contrary to the public morals, contravenes no principle of public policy." See also Sipes v. McGhee, supra.

In general throughout the United States, covenants or agreements restricting real property from ownership or [fol. 76] occupancy by persons of a certain race, or by anyone not of the Caucasian race, have been held not contrary to public policy. See 3 A. L. R. 2d, p. 486 for annotations.

We are in doubt that restrictive clause contravenes sound public policy, and must therefore hold that there has been no such violation of public policy such as would justify the holding of the restrictive agreement void in the contract.

It is fundamental in our law that a private individual may, unless expressly forbidden by police power enactments, deal freely with whom he pleases, and his reasons or policy are not the concern of the state. The state may not aid him in certain of his restrictive or arbitrary agreements, and so here if plaintiff had herself, lowered her deceased husband's body into the ground in violation of her agreement with defendants, the State would have had to deny defendants aid in restraining her, nor could it have helped in punishing her for violating that agreement.

III. Plaintiff further contends that the words used in the contract are not clear, but are ambiguous, and should not have been decided by the court as a matter of law and that certain questions regarding the meaning of the terms used in the contract should have been submitted to the jury. She contends first that the contract restriction refers to the person buying the lot and not to the person to be buried in the lot. Next, she contends, the term "Cauca-

sian" as used in the contract was too vague and indefinite to be enforceable and should have been left to the jury to determine whether or not plaintiff's husband qualified. She also complains that the court should not as a matter of law determine the question of whether one alleged to be of 11/16 Indian blood was or was not a Caucasian under the contract, "Exhibit A".

[fol. 77] We are unable to follow the plaintiff's argument for it is too well settled in this state for further debate that the validity and construction of a written contract agreement is a matter of law for the court to decide and is not a question of fact for the jury.

In 53 Am. Jur. p. 226, §268, we find the general rule as follows: "The question whether a writing is, upon its face, a complete expression of the agreement of the parties is one for the court, and subject to qualifications where the contract is uncertain and ambiguous * * * the general rule is that where a contract has been reduced to writing, its interpretation, construction, or legal effect is for the court and not for the jury. This is true * * * provided the writings express the complete agreement of the parties, and the language used is clear, plain, certain, undisputed, unambiguous, unequivocal, and not subject to conflicting inference, or where the only doubt as to its meaning arises from the language the parties used, and not from intrinsic matters. In other words, where a clear meaning can be ascertained without resort to intrinsic facts, the interpretation of a writing is for the court."

Was the wording of the contract amply clear, plain and unambiguous? It is difficult to believe that the wording of the contract, "* * * burial privileges accrue only to members of the Caucasian race" meant anything else than the race of the one to be buried. Certainly not to the one that purchased the lot. This was the only reasonable determination of the intention of the restrictive clause in this agreement.

[fol. 78] We are also clear that a person of 11/16 Indian blood is as a matter of law not a Caucasian. The word "Caucasian" is not a strictly scientific term but is interpreted according to its generally accepted meaning. It is sufficient to say that one admittedly of 11/16 Indian blood is not a Caucasian and it would have been error to have

submitted the question to a jury. No doubt where the percentage is in question or is disputed, a jury might determine the matter but that is not the fact in this case. We have been cited no authority, nor have we found any, which holds that one having greater than 50% Indian or negro blood is a Caucasian. In re Balsara C. C. 180 Fed. 694, the court said: "We think that the words refer to race and include all persons of the white race, as distinguished from the black, red, yellow or brown races, which differ in so many respects from it. Whether there is any pure white race and what people belong to it may involve nice discriminations, but for practical purposes there is no difficulty in saying that the Chinese, Japanese and Malays, and the American Indians do not belong to the white race."

As popularly understood by the common man a Caucasian and white person is synonymous, and is sufficiently definite to be recognized legally and is not void for uncertainty. Wadia v. U. S., 101 Fed. 2d 7.

We agree with the decision of the district court that the language used in the contract, Exhibit A, was amply clear, certain and unambiguous, and hold that the construction to be placed on the contract was for the court and not for the jury. See Rath v. Schoon, 192 Iowa 180, 182 N. W. 180; Seibel v. Commonwealth Life Ins. Co., 194 Iowa 701, 190 N. W. 173; Comptograph Co. v. Burroughs Add. Machine Co., 179 Iowa 83, 159 N. W. 465; Weitz' Sons v. U. S. [fol. 79] Fid. & Guar. Co., 206 Iowa 1025, 219 N. W. 411. Equitable Life Ins. Co. v. Johnston, 222 Iowa 687, 269 N. W. 767, 108 A. L. R. 257; Hubbard v. Marsh, 241 Iowa 163, 40 N. W. 2d 488; Farrell v. Wallace, 161 Iowa 528, 143 N. W. 488; Lamson v. Horton-Holden Hotel Co., 193 Iowa 355, 185 N. W. 472; 26 A. L. R. 465, 12 Am. Jur. Contracts p. 756, §232.

In Lamson v. Horton-Holden Hotel Co., supra, we said: "No fraud or misrepresentation is charged or proven on either side. * * * If there be neither fraud nor mistake justifying equitable interference, the terms of the contract as written must prevail." A misconstruction of a contract written is a mistake of law and not of fact.

We find here no allegations as to misrepresentation, fraud or deceit in the obtaining or the execution of the agreement between the plaintiff and the defendant corpora-

tion. The only allegation that slightly tends to negative the terms of the written agreement or question the meeting of minds, was an allegation in plaintiff's petition that "the defendant knew or reasonably should have known that Sergeant Rice was a Winnebago Indian." This allegation does not go so far as to claim a waiver of the terms of the written contract, in fact, it does no more than suggest another separate agreement or a misunderstanding of the terms of the later executed agreement.

In Blackledge v. Puncture Proof Retread Co., 190 Iowa 1303 at 1307, 181 N. W. 662, 663, Judge Evans, speaking for the court said: "While it is true as an abstract proposition of law, that an independent oral contract may be entered into between the parties to a written contract, and contemporaneously therewith, it is also true that such oral contract must be independent in fact, and must not be a contradiction, modification, or qualification of the written [fol. 80] contract, either as to its enforcement, its consideration, or its executory obligations."

We have recently held such an allegation as to defendant's knowledge was insufficient and proof thereof improper under the parol evidence rule. Des Moines v. West Des Moines, 56 N. W. 2d, 904-906.

IV. The remaining contention of plaintiff involves her count one, which sounds in tort. Her error, No. 3, contends that the court erred in holding as a matter of law that the question of damage resulting from the moving of the body and for the publication of the pamphlet, Exhibit C, could not be presented to the jury in view of the prior adjudication of law points. The foundation of all of plaintiff's theories of action is a claimed breach of contract between her and the cemetery corporation. After deleting the restricting clause which she claims void, her damage action depends upon defendants' breach and her consequent suffering and damage.

Conduct that is merely a breach of contract is not a tort. The contract, however, may establish a relationship demanding the exercise of proper care, and then a tortious and intentional violation of that requirement might give rise to a tort liability. Peitzman v. City of Ilmo, 141 F. 2d 956; South v. Weber, 70 S. Dak. 232, 16 N. W. 2d 537.

Plaintiff here asks the court to construe the contract in

such a way that defendants' refusal to bury plaintiff's deceased husband could be considered wrongful or tortious. In other words, upon the construction of the relationship of the parties under the contract would depend the question of whether or not a tort had been committed against the [fols. 81-82] plaintiff. Excepting for the contract, the refusal of defendants to bury plaintiff's deceased husband could not in any way be considered wrongful or tortious. It must therefore be clear that unless the contract was reformed by deleting the restrictive clause, whereby defendants would be guilty of an intentional breach of contract, and intentionally committing a wrongful act against plaintiff, under their contract relationship, no tort liability would be incurred by defendants' acts, first in refusing to bury plaintiff's deceased husband, and second, in explaining their alleged right and reasonable action in the pamphlet. No contention is made that plaintiff has stated a cause of action in defamation of character nor did she claim an independent action based upon the removal of the body from the grave site. The court therefore correctly held there was no jury question under an independent tort action, but that recovery under the tort contention depended upon her success in pleading and proving a breach of contract relationship. This being determined adversely to her by the court, her tort claim must also fail.

Affirmed.

All Justices Concur.

[fols. 69-71] IN THE SUPREME COURT OF IOWA

PETITION FOR REHEARING

Comes now the plaintiff-appellant in the above-entitled cause and respectfully petitions the Court for a rehearing on the opinion handed down and filed by the Court on September 22, 1953, which opinion has not as yet appeared in the advance sheets of the North Western Reporter or the official Iowa Reports at the time of the preparation of this petition for rehearing.

The plaintiff-appellant, as a basis for this petition for rehearing, states that the Court erred in its conclusions of law and findings of fact in the following particulars:

1. By holding that the act of the Iowa District Court and of the Supreme Court of Iowa in allowing the defendants-appellees to use the restrictive covenant in question as a defense to an action for damages did not amount to state action prohibited by the equal protection clause of the 14th Amendment to the United States Constitution and Section 1, Article 1, and Section 6, Article 1 of the Constitution of the State of Iowa.

2. By refusing to directly pass upon the question of a violation of the due process clause of the 14th Amendment to the United States Constitution properly raised in all stages of the litigation, or, if this question was indirectly passed upon, by holding that the due process clause of the 14th Amendment to the Constitution of the United States of America was not violated by the conduct of the defendants-appellees and by the conduct of the District and Su-
[fols. 72-83] preme Courts of the State of Iowa in allowing the defendants-appellees to defend against this action for damages by use of the restrictive covenant in question.

3. By holding that the United Nations Charter, as a solemn treaty of the United States Government, has no application to this litigation, and, specifically, that the United Nations Charter does not prevent the Courts of the State of Iowa from allowing the defendants-appellees to defend this action for damages by use of the restrictive covenant in question.

4. By holding that the public policy of the State of Iowa and of the United States of America is not violated by the

District Court of Iowa and the Supreme Court of Iowa when those Courts allowed the defendants-appellees to defend their conduct in an action for damages by use of the restrictive covenant in question.

I

By holding that the act of the Iowa District Court and of the Supreme Court of Iowa in allowing the defendants-appellees to use the restrictive covenant in question as a defense to an action for damages did not amount to state action prohibited by the equal protection clause of the 14th Amendment to the United States Constitution and Section 1, Article 1, and Section 6, Article 1 of the Constitution of the State of Iowa.

[fols. 84-87] IN THE SUPREME COURT OF IOWA

NOTICE OF ORAL ARGUMENT

Notice is hereby given that counsel for the plaintiff-appellant asks to be heard in oral argument on the submission of this cause.

Neil R. McCluhan, Winnebago, Nebraska; Kindig & Beebe, 503 Toy Natl. Bank Building, Sioux City 1, Iowa, Attorneys for Plaintiff-Appellant.

[fol. 88] [File endorsement omitted.]

[fols. 89-93] IN THE SUPREME COURT OF IOWA

RESISTANCE TO PETITION FOR REHEARING—Filed October 30, 1953

Come now, defendants-appellees and resist the Petition of Plaintiff-Appellant herein for Rehearing in the above-entitled cause for the reason that the said Petition and accompanying Brief and Argument fails to state any "manifest error or misapprehension of facts, or application of correct principles of law."

The said Petition makes untrue and unwarranted assumptions of fact, repeatedly begs the questions in issue and is

simply a restatement of claims already fully presented, argued and determined in the opinion of the Court in this case, which appears in Advance Sheets, 60 N. W. 2d, page 110.

[fols. 94-96] IN THE SUPREME COURT OF IOWA

NOTICE OF ORAL ARGUMENT

Notice is hereby given that counsel for Defendants-Appellees ask to be heard in oral argument on the submission of the Petition for Rehearing.

Shull & Marshall, Harper, Gleysteen & Nelson, Attorneys for Defendants-Appellees.

[fol. 85] IN THE SUPREME COURT OF IOWA

No. 4-48304

EVELYN RICE, Plaintiff-Appellant,

vs.

SIOUX CITY MEMORIAL PARK CEMETERY, INC., a Corporation, F. H. Lytle and J. M. Gunnell, Defendants-Appellees.

November 17th, 1953

Petition for Rehearing and Resistance thereto submitted to the Iowa Supreme Court.

November 20th, 1953.

Appellants Petition for Rehearing having been fully considered is hereby denied.

By Supreme Court of Iowa.

I hereby certify that the foregoing is a full, true and complete copy of the order made by said Court in the above entitled cause, as full, true and complete as the same remains on file and of record in my office.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court, at Des Moines, Iowa, this 19th day of January, A. D., 1954.

Helen O. Galvin, Clerk.

[fol. 99] IN THE SUPREME COURT OF THE UNITED STATES

No. 591

[Title omitted]

STIPULATION—Filed April 23, 1954

It is stipulated between all of the counsel of record that the Clerk, in preparing the printed record for use by the Court and counsel, may eliminate the duplicity of petitions and answers found in the record used in the Supreme Court of Iowa and in the transcript of record previously prepared by the Clerk for use in the petition for a writ of certiorari by deleting therefrom the petition therein printed commencing at Page 4, line 11, and running through Page 13, line 6, and inserting in lieu thereof the composite amended petition shown commencing at Page 44, line 27, and running through Page 55, line 16.

Following the above deletion and insertion, the Clerk is authorized to print the Exhibits "A," "B," and "C" shown commencing at Page 13, line 8, and running through Page 20, line 31.

The Clerk is further authorized to delete all of Pages 21, 22, 23, 24, 25, 26, 27, and the first 20 lines of Page 28 and insert in lieu thereof the joint answer of defendants shown commencing at Page 55, line 25, and running through Page 59, line 11. The Clerk will delete the plaintiff's objection to the amended composite answer appearing on Page 59 and running from lines 13 to 27, inclusive. The Clerk will further delete all material found on Page 43, lines 17 [fol. 100] to 33, inclusive, and Page 44, lines 1 to 21.

Dated this 21st day of April, A. D. 1954.

(S.) Neil R. McCluhan, Winnebago, Nebraska; (S.) Lowell C. Kindig, 503 Toy National Bank Building, Sioux City 1, Iowa, Attorneys for Petitioner.

(S.) Jesse E. Marshall, 1109 Badgerow Building, Sioux City, Iowa; (S.) H. C. Harper, 615 Security Bank Building, Sioux City, Iowa, Attorneys for Respondents.

[fols. 101-102] [File endorsement omitted.]

[fols. 103-104] SUPREME COURT OF THE UNITED STATES,
OCTOBER TERM, 1953

No. 591

ORDER ALLOWING CERTIORARI—Filed April 12, 1954

The petition herein for a writ of certiorari to the Supreme Court of the State of Iowa is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Mr. Justice Jackson took no part in the consideration or decision of this application.